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NO. 89-134

Supreme Court, U.S.

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

BARRY GIBBS,  
Cross-Petitioner  
v.

COMMONWEALTH OF PENNSYLVANIA,  
Cross-Respondent

On Petition for Writ of Certiorari  
to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION TO  
CROSS-PETITION FOR WRIT OF CERTIORARI

ALAN B. COOPER  
Assistant District Attorney  
CHARLES F. LIEBERMAN  
District Attorney, Pike County  
Pike County Administration  
Building  
506 Broad Street  
Milford, PA 18337  
(717) 296-7744

MARIANNE E. COX  
Special Assistant District  
Attorney for Pike County  
\*GAELE McLAUGHLIN BARTHOLD  
Special Assistant District  
Attorney for Pike County  
1421 Arch Street  
Philadelphia, PA 19102  
(215) 686-5700

\*Counsel of Record

21pp



## QUESTION PRESENTED

Should this Court deny the cross-petition for writ of certiorari where none of the four issues raised is final, and three of the four claims were never raised as a federal claim in the state courts?



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OPINIONS BELOW

The Judgment and Opinion of the Pennsylvania Supreme Court, dated February 2, 1989, which are unofficially reported at 553 A.2d 409 (1989), are reproduced at cross-petitioner's Appendix A. The Order of the Pennsylvania Supreme Court, dated April 17, 1989, denying reargument is



reproduced at cross-petitioner's Appendix B. The unreported Opinion and Order of the Court of Common Pleas of Pike County, entered on June 24, 1986, denying post-verdict motions, are reproduced at cross-petitioner's Appendix C. The Opinion and Order of the Court of Common Pleas of Pike County, dated November 4, 1986, denying reconsideration of sentence are reproduced at cross-petitioner's Appendix D.

#### STATEMENT OF JURISDICTION

Cross-petitioner seeks review by writ of certiorari pursuant to 28 U.S.C. §1257 (a). This Court does not have jurisdiction to consider the petition, as none of the claims raised is final, and most were never raised as a federal claim in the state courts.





## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Five, which provides in pertinent part:

... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb ..., nor be deprived of life, liberty, or property, without due process of law ...

United States Constitution, Amendment Eight, provides:

... nor cruel and unusual punishments inflicted.

United States Constitution, Amendment Fourteen, Section 1, Due Process Clause, provides:

... nor shall any State deprive any person of life, liberty, or property, without due process of law ...

## COUNTER-STATEMENT OF THE CASE

On March 27, 1984, cross-petitioner was hired to kill Bruce Burke after agreeing to a plan proposed by the intended victim's wife, who hoped to collect the



proceeds of a \$25,000 life insurance policy. The agreement called for cross-petitioner to murder Mr. Burke at the Hemlock Community Association barracks where he was employed as a security guard, and, if necessary, to also wound or kill George Mehl, Mr. Burke's co-worker. Cross-petitioner drove to the barracks with Mrs. Burke and other co-defendants, who were also members of the victim's family. He was armed with the intended victim's .357 magnum revolver which Mrs. Burke supplied. Cross-petitioner fired six shots through the window of the barracks. One shot struck Mr. Mehl in the head, killing him, however, Bruce Burke escaped serious injury. When Mr. Burke returned home later that evening, he discovered that his .357 revolver had been removed from its locked case, and that the locked drawer where he kept the bullets for the weapon had been pried open. He turned the gun over to the state police.



Cross-petitioner was thereafter arrested pursuant to a warrant and, after being advised of his Miranda rights, made a statement detailing the murder.

On November 20, 1984, a hearing was held on cross-petitioner's motion to suppress his statements. That motion was denied on November 26, 1984, by the Honorable Harold A. Thomson, Jr., of the Pike County Court of Common Pleas. Cross-petitioner's trial commenced on December 10, 1984, before Judge Thomson, sitting with a jury. The jury subsequently convicted cross-petitioner of first degree murder and, after a separate sentencing hearing, returned a sentence of death. Contrary to cross-petitioner's allegations, ample evidence was, in fact, presented at the trial and penalty phase that the victim was a "peace officer" and that the murder was a contract killing. Gibbs' allegations to



the contrary are not factual statements but, rather, legal conclusions.

On June 24, 1986, the trial court denied cross-petitioner's motions for a new trial and arrest of judgment.

Cross-petitioner appealed to the Pennsylvania Supreme Court raising, inter alia, a challenge to the admissibility of his statement. On February 2, 1989, the Supreme Court of Pennsylvania reversed cross-petitioner's conviction on the ground that his statement was not obtained in compliance with Miranda v. Arizona, 384 U.S. 436 (1966) and Edwards v. Arizona, 451 U.S. 477 (1981). On April 13, 1989, the Pennsylvania Supreme Court denied cross-petitioner's and cross-respondent's applications for reargument. The Commonwealth timely filed a petition for writ of certiorari. Defendant-respondent then filed the instant cross-petition for certiorari.

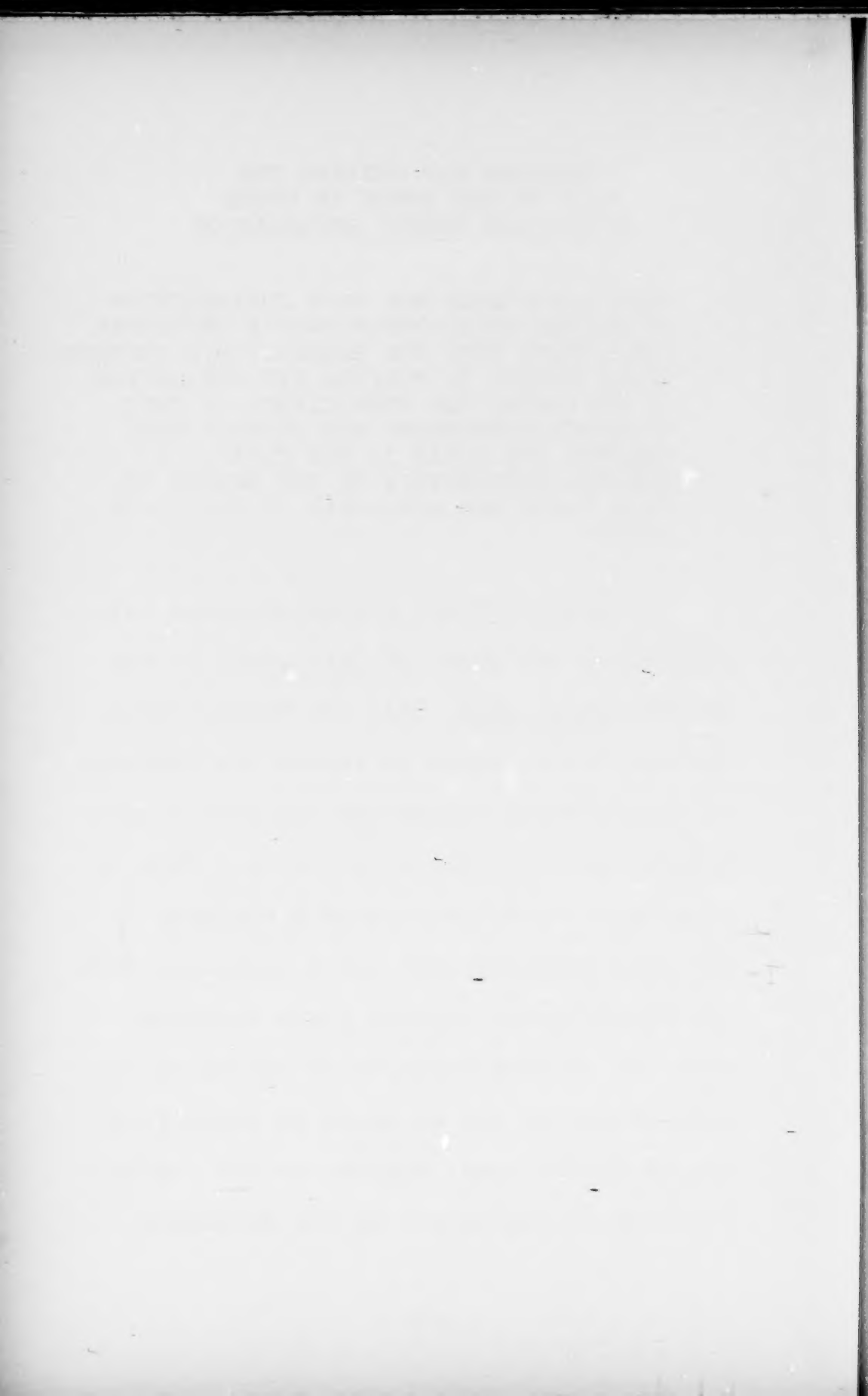




REASONS FOR DENYING THE  
WRIT AS SET FORTH IN CROSS-  
PETITIONER GIBBS' APPLICATION

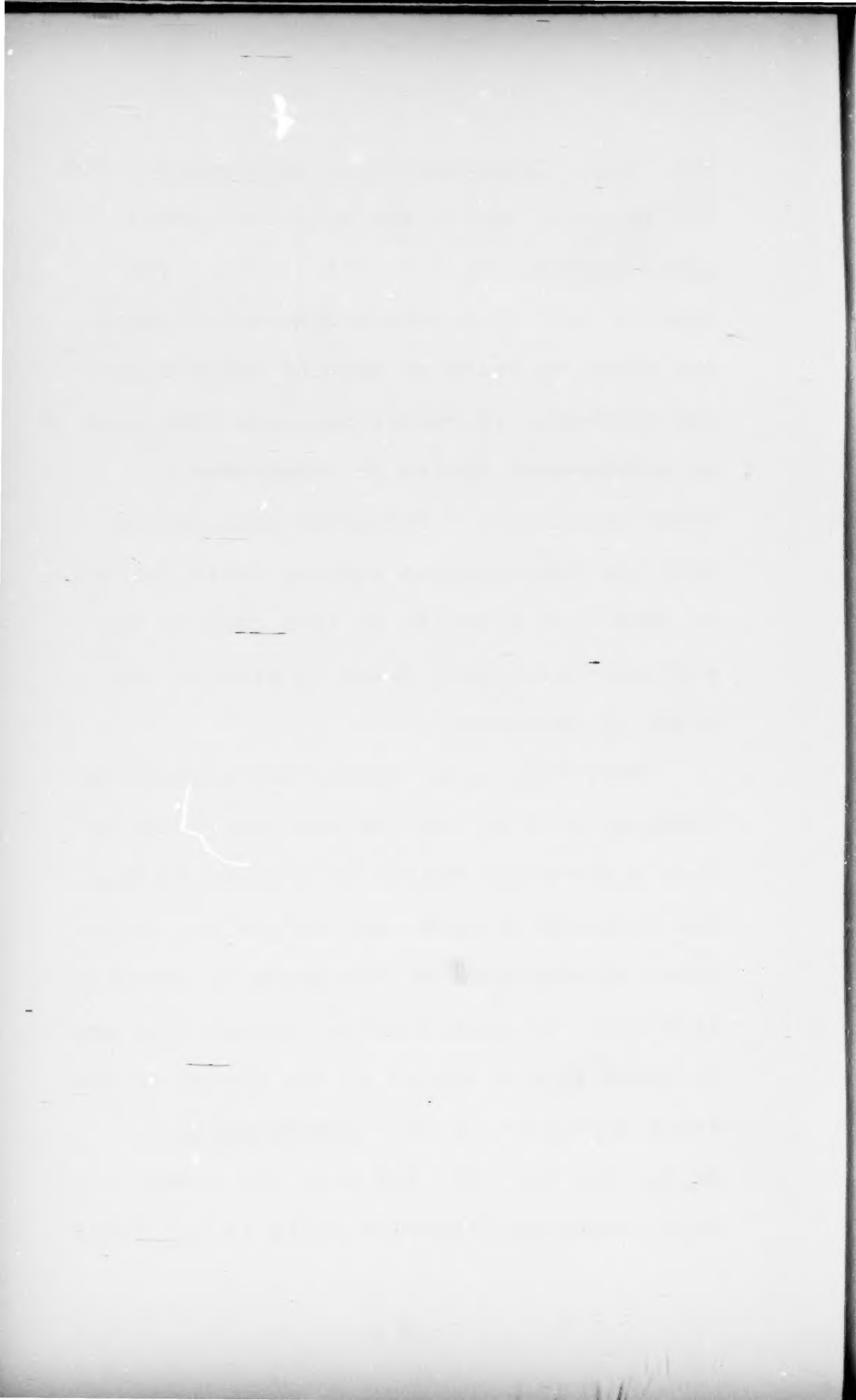
- I. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW CROSS-PETITIONER'S UNFOUNDED CONJECTURE THAT THE PENNSYLVANIA SUPREME COURT FAILED TO FULFILL ITS OBLIGATION OF REVIEWING THE SUFFICIENCY OF THE EVIDENCE SUPPORTING HIS CONVICTIONS, BECAUSE THE CLAIM IS NOT FINAL, AS FURTHER PROCEEDINGS ON THE MERITS OF THIS CLAIM ARE AVAILABLE IN THE STATE COURTS.

Cross-petitioner claims absolute entitlement to the grant of certiorari on the ground, inter alia, that the Pennsylvania Supreme Court failed to review the adequacy of the evidence supporting his convictions before remanding for a new trial. This is baseless. Cross-petitioner's argument is entirely premised upon his speculation that the Pennsylvania Supreme Court waived from its uniform practice of reviewing the sufficiency of the evidence in every first degree murder case, whether or not the sufficiency is challenged by the defendant.



See, e.g., Commonwealth v. Zettlemoyer, 500 Pa. 16, n.3, 26-27, 454 A.2d 932 (1982), cert. denied, 461 U.S. 970 (1983). The court's rule of practice does not require the court to write an opinion describing the evidence; it merely requires that such an independent review be undertaken. Cross-petitioner's unfounded speculation that the Pennsylvania Supreme Court failed to make such a review in this case is not a proper basis upon which to premise the grant of certiorari.

Moreover, under Pennsylvania practice, cross-petitioner has the absolute right to file a pre-trial motion to dismiss on double jeopardy grounds, and unless the trial court determines that the issue is patently frivolous, an interlocutory appeal also may be taken from a denial of the motion to the state appellate court. Commonwealth v. Brady, 510 Pa. 336, 508 A.2d 286 (1986). Thus, cross-petitioner's claim is not final



as further proceedings are available to him on the merits of this issue in the state courts. For this additional reason, a writ of certiorari should not issue. See, e.g. Flynt v. Ohio, 451 U.S. 619, 620 (1981) (per curiam) (decision is not final "where anything further remains to be determined by a state court...").

- II. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW CROSS-PETITIONER'S REMAINING CLAIMS AS THEY ALSO ARE NOT FINAL, AND NONE WAS RAISED AS A FEDERAL CLAIM IN THE STATE COURT.

This Court has consistently refused certiorari to petitioners who have failed to explicitly raise their federal claim in the state courts. See, e.g., Webb v. Webb, 451 U.S. 493, 496-497 (1981) (dismissing, for want of jurisdiction, writ of certiorari previously granted where record below did not affirmatively show reference to any constitutional clause or federal cases,



despite petitioner's use of phrase "full faith and credit"); Bowe v. Scott, 233 U.S. 658, 664-666 (1914) (claim of taking "without due process of law," which does not refer to federal constitution, does not state federal claim). Additionally, as noted above, this Court will not review non-final judgments rendered by state courts. Flynt v. Ohio, 451 U.S. at 620. For the reasons more fully set forth below, these principles are applicable to cross-petitioner's remaining claims, and review by this Court is unwarranted.

A. Cross-Petitioner's Claim No. 2 --  
Prosecutorial Misconduct

Cross-petitioner Gibbs frames Question 2 as an allegation that there was prosecutorial misconduct so extensive that the Commonwealth should be punished through a judgment of acquittal, thus invoking double jeopardy protections. In reviewing the



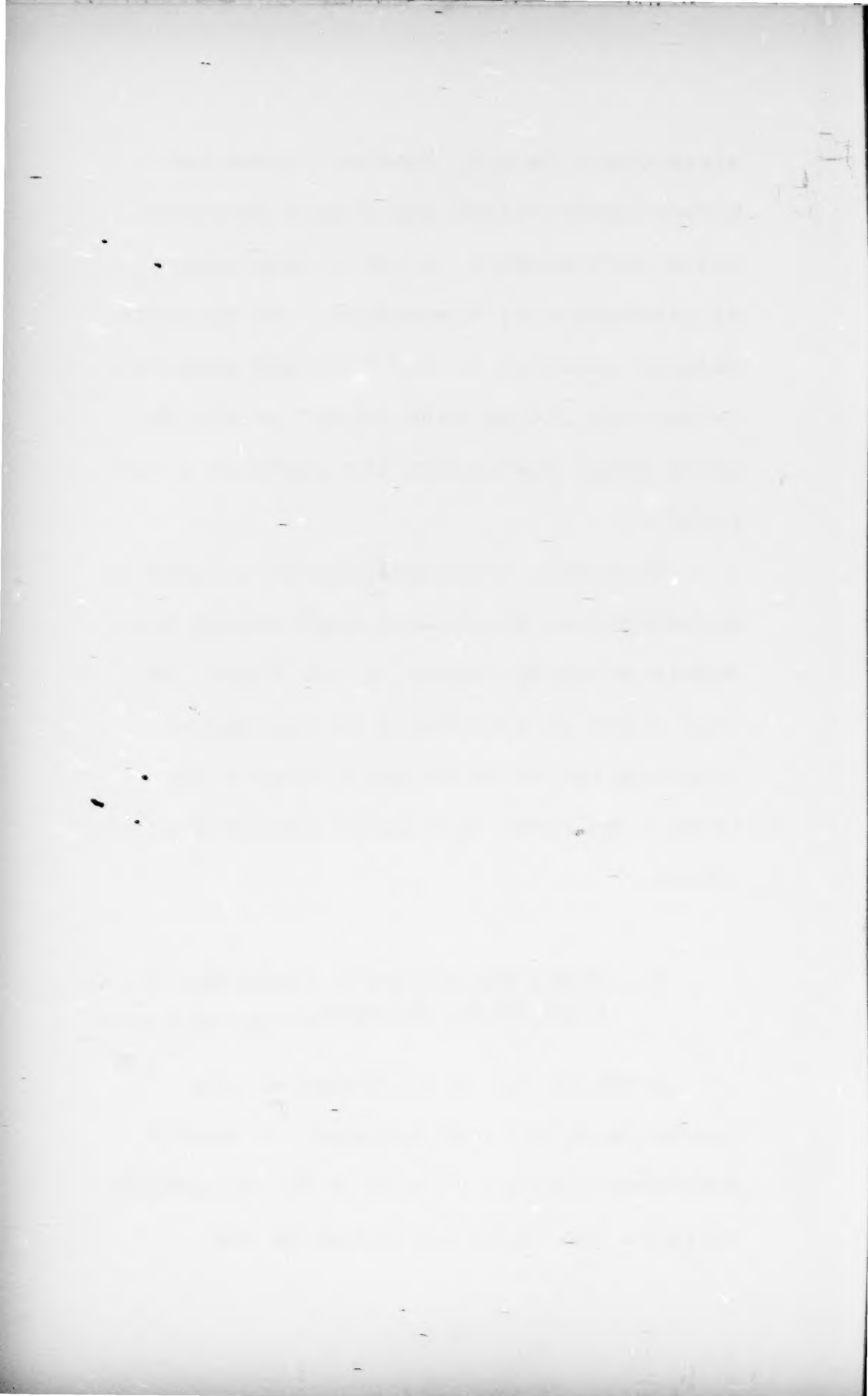


state court record, however, cross-petitioner never raised any double jeopardy claim with respect to his allegations of prosecutorial misconduct. No specific federal question of any kind was asserted; rather the claims were raised merely as trial error justifying the grant of a new trial.

Moreover, cross-petitioner's claim of prosecutorial misconduct implicating his double jeopardy rights is not final, as this issue is reviewable in the state courts prior to cross-petitioner's new trial. As such, this Court should decline review.

B. Cross-Petitioner's Claim No. 3 --  
Collateral Estoppel

Question No. 3 is framed as one involving collateral estoppel -- when a defendant intends to kill A but mistakenly kills B, can he be convicted of the



attempted murder of A and the murder of B? This issue was not raised at any time in any manner in the state system. Thus, it is not properly before this Court. It also can be litigated pre-trial by cross-petitioner. Review should therefore be declined.

C. Cross-Petitioner's Claim No. 4 --  
Death Penalty

An issue presented to the jury at the penalty phase was whether a security guard for a private community is a "peace officer" within the meaning of 42 Pa.C.S. §9711 (d)(1), an "aggravating circumstance" under Pennsylvania's death penalty statute. Defendant now contends that the term "peace officer" is vague, and that the jury's considerations of this aggravating factor was arbitrary and capricious. In the state courts, however, cross-petitioner raised this issue as a factual one involving the



interpretation of a Pennsylvania statute to the facts at hand. At no point in the state courts did cross-petitioner challenge the constitutionality of the statute on vagueness grounds. This matter never having been raised as a specific federal question, it cannot be the basis for a grant of certiorari.

Additionally, cross-petitioner's claim has never been passed upon by the highest court in the state, as the Pennsylvania Supreme Court granted cross-petitioner a new trial on the other grounds without addressing this issue. Thus, cross-petitioner is seeking this Court's review of a non-final order. See O'Dell v. Espinoza, 456 U.S. 430 (1982) (per curiam) (where state Supreme Court remanded case for new trial, its decision was not final, and United States Supreme Court did not have jurisdiction to review claims). As this Court does not have jurisdiction over any



of cross-petitioner's claims, the cross-petition for certiorari should be denied.





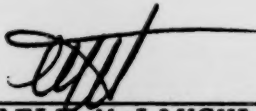
CONCLUSION

For the foregoing reasons, cross-respondent, the Commonwealth of Pennsylvania, respectfully requests this Honorable Court to deny the Cross-Petition for Writ of Certiorari.

Respectfully submitted,

ALAN B. COOPER  
Assistant District Attorney  
CHARLES F. LIEBERMAN  
District Attorney, Pike County  
Pike County Administration  
Building  
506 Broad Street  
Milford, PA 18337  
(717) 296-7744

MARIANNE E. COX  
Special Assistant District  
Attorney for Pike County



\*GAELE McLAUGHLIN BARTHOLD  
Special Assistant District  
Attorney for Pike County  
1421 Arch Street  
Philadelphia, PA 19102  
(215) 686-5700

\*Counsel of Record

October 23, 1989